TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1318.

JAMES C. CALLAN, APPELLANT,

vs.

A. A. WILSON, MARSHAL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 28, 1887.

pellee sold it to Dore, he, the appellant, by that sale acquired rights of redemption to the purchase money. How he acquired any rights to the proceeds, when he had none to the land, is a proposition of law or logic incomprehensible to me.

In view of the facts of the case, it is inconceivable how the complainant can claim any title to any part of the $56,000. He might perhaps have a right to claim the 40 bonds from Mr. Dore, if they were of any value, as freed from the pledge by the sale of the land and their transfer to Dore.

Point IV.

THE FACT THAT THE APPELLEE'S OFFICERS, IN JANUARY AND FEBRUARY, 1877, WROTE TO THE BOWEN BROTHERS THAT THEY WOULD SELL THE 40 BONDS, DOES NOT MILITATE AGAINST THE DEFENSE, OR ASSIST THE APPELLANT.

The appellee had a perfect right to sell those bonds, and whether, in case of a sale (which was never made), before endorsement of payment of proceeds of sale, a *bona fide* purchaser without notice of the trustee's sale, might have had a claim to the land or not, is entirely immaterial here.

Those letters certainly do not estop the appellee from insisting in this action that the trustee's sale divested Bowen Brothers of all equity of redemption in the land, and that the appellant never acquired a shadow of right to the $56,000.

EDWARD SALOMON,
Counsel for Appellee.

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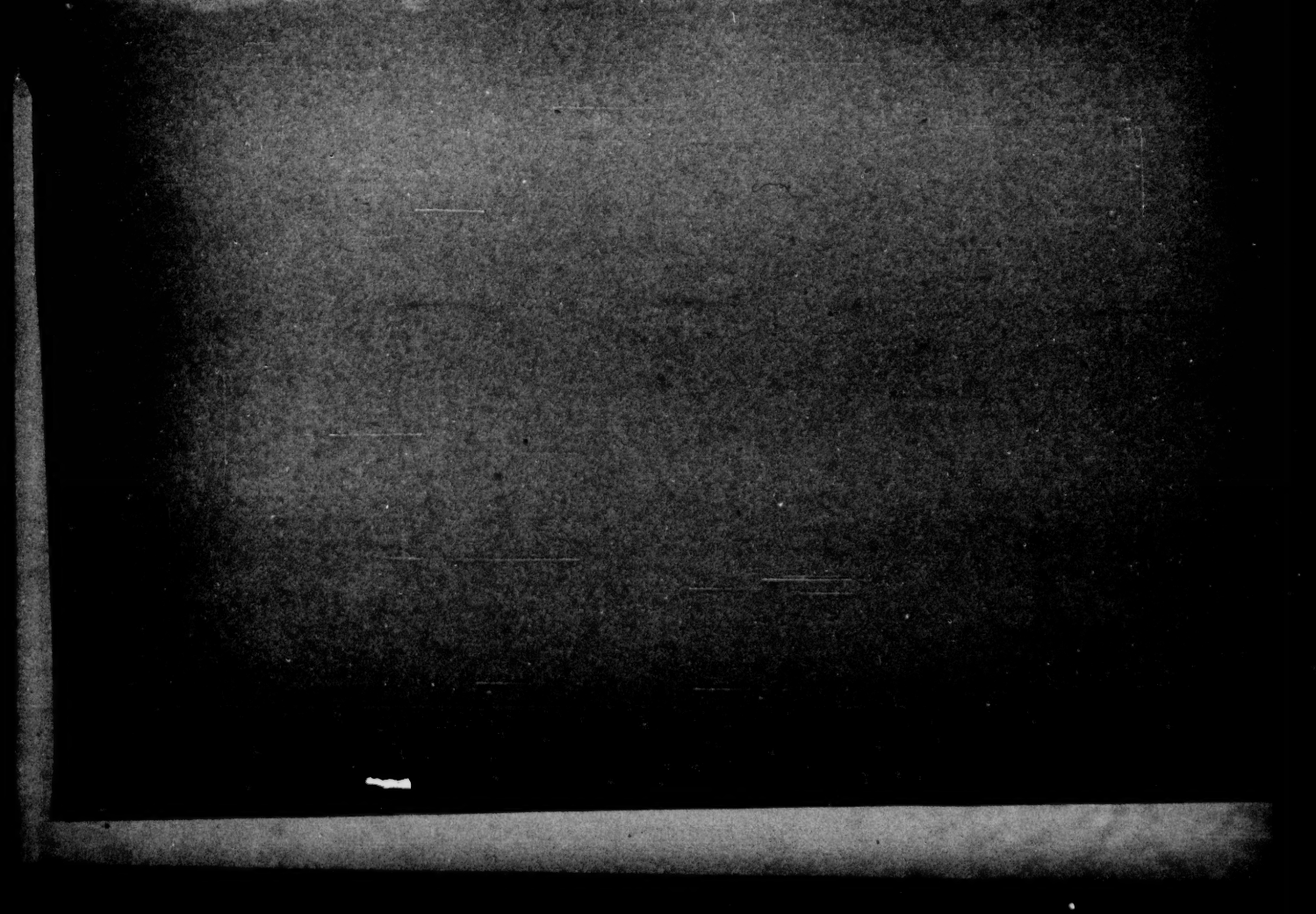

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 29, 1887.

1 *Petition for a Writ of Habeas Corpus. Filed Nov.* 16, 1887. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

In the Matter of the Petition for the Writ of *Habeas Corpus* of JAMES C. CALLAN. No. 16889. Criminal docket 16.

[Seal Supreme Court of the District of Columbia.]

To the honorable the justices of the supreme court of the District of Columbia:

Your petitioner, James C. Callan, respectfully gives the court to be informed that on the ninth day of Sept., A. D. 1887, there was issued from the police court of the District of Columbia a certain warrant charging that certain other persons in said warrant mentioned, together with your petitioner, did, on the seventh day of August, A. D. 1887, at the city of Washington, District of Columbia, commit the crime of conspiracy, as will appear from said warrant, a copy of which is filed herewith and made a part hereof; that your petitioner, under and by authority of said warrant, was arrested and taken before said police court for trial.

That the United States, by its representative, Augustus S.
2 Worthington, Esq., caused to be filed in said court, on information charging that your petitioner did, on the seventh day of August, A. D. 1887, together with other persons, commit the crime of conspiracy, a more particular description of which said charge is to be found in said information, a copy of the same being filed herewith and made a part hereof, and that on the 22d day of September, 1887, your petitioner did, as required, appear in the said police court for trial upon the several matters set out in said information, and accordingly your petitioner did, on the 22d day of September, A. D. 1887, enter in said police court, after having had the charge contained in said information read to him, his plea of not guilty, and thereupon demanded that the said charge in said complaint should be submitted to a jury for consideration, and that your petitioner should be tried by a lawful jury on said complaint—a copy of such said demand for a trial by jury made by your petitioner is filed herewith and made a part hereof—and that, notwithstanding such demand made as aforesaid, the same was denied, and that thereupon
3 the judge proceeded to hear the testimony of the witnesses called in support of said charge presented as aforesaid, and he did on the 8th day of October, A. D. 1887, adjudge your petitioner guilty of the matters and things set out against him in said information, and thereupon sentenced your petitioner to pay a fine of twenty-five dollars, and in default of the payment thereof to suffer imprisonment in the jail of the District of Columbia for the period of thirty days; whereupon your petitioner noted and perfected an appeal to the supreme court of the District of Columbia, and that

on the 16th day of November, A. D. 1887, having withdrawn his said appeal, and not having paid the said fine of twenty-five dollars, and having been surrendered by his surity, he was by the order of the court committed to the custody of the marshal of the District of Columbia, to be by him imprisoned in accordance with the sentence of the police court. A copy of said commitment is filed herewith and made a part hereof.

4 Your petitioner further shows that he is now in the custody and keeping of the said marshal, and is unlawfully restrained of his liberty, for that your petitioner has not been indicted of said alleged crime by a grand jury, nor has he been tried, as he respectfully submits was his right, as a person accused of a crime entitled him to be tried, to wit, by a jury of twelve lawful men, residents of the District of Columbia, nor was the proof, as demanded by him, submitted to any jury, and that said penalty imposed by the said court is contrary to the law of the land, for that it was not imposed upon a conviction upon an indictment found by a grand jury of the District of Columbia, and that he was deprived of his constitutional right to a speedy trial, and that he was tried before a court not created in accordance with the United States Constitution, nor had the police court jurisdiction to hear and determine the matters and things set out in the said information, nor was the said penalty imposed upon the verdict of a jury.

5 Your petitioner therefore prays that your honorable court will grant to him the writ of *habeas corpus*, requiring the marshal of the District of Columbia to forthwith produce your petitioner in court, and that upon the hearing of this petition and said writ he prays his discharge from custody, and that he may be restored to liberty.

And your petitioner will ever pray, &c.

JAMES C. CALLAN.

DISTRICT OF COLUMBIA:

James C. Callan, the petitioner in the foregoing petition described, says he has heard read said petition and knows the contents thereof; that the matters stated herein of his own knowledge are true, and those stated upon information and belief he believes to be true.

JAMES C. CALLAN.

Subscribed and sworn to this 16th day of November, A. D. 1887.

R. J. MEIGS, *Clerk*,
By W. E. WILLIAMS, *Ass't Clk.*

CHAS. S. MOORE,
J. H. RALSTON,
Counsel for Petitioner.

6 *Exhibit to Petition.*

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

In the Police Court of the District of Columbia. September Term, A. D. 1887.

Augustus S. Worthington, Esquire, attorney of the United States in and for the District of Columbia, who, for the United States, prosecutes in this behalf, comes here into court, at the county and District aforesaid, on the ninth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, in this said term, and for the said United States gives the court here to understand and be informed on the oath of one Franz Krause, made on the day last aforesaid, at the county and District aforesaid, before him, the said attorney of the United States as aforesaid, that during the months of July and August, in the year aforesaid, and at the times of the hereinafter-stated occurrences, one Franz Krause, Louis Naecker, otherwise called Ludwig Naecker, August Naecker,
7 Charles Arndt, Louis Naecker, Junior, Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Casper Windus, Earnest Arndt, and Christian Feige were residents of the said District, and each of them was then and there pursuing the calling and trade of a musician.

That during the months of July and August, in the year aforesaid, and at the time of the occurrence hereafter stated, there was in said District an organization and association of musicians called "The Washington Musical Assembly," and otherwise called "The Washington Musical Assembly, No. 4308, K. of L.," which said association was an organization of musicians residing in the District of Columbia, comprising a large number, to wit, one hundred and fifty members, and was a branch of an organization and association commonly known as and called "The Knights of Labor of America," which, during said months of July and August, in the year aforesaid, extended throughout the United States and comprised a large number, to wit, five hundred thousand members, of whom a large number, to wit, ten thousand, were then residents of the District
8 of Columbia.

That during said months of July and August, in the year aforesaid, and at the time of the occurrences hereinafter stated, one Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fisher, and Frank Pistorio, all late of the county and District aforesaid, were members of said association called "The Washington Musical Assembly," otherwise called "The Washington Musical Assembly, No. 4308, K. of L.," and each of them was then and there pursuing the calling and trade of a musician.

That on the seventeenth day of July, in the year aforesaid, the said Franz Krause was a member of the said last-named association,

and on said last-mentioned day said last-mentioned association imposed upon said Franz Krause a fine of twenty-five dollars and another fine of fifty dollars, the legality of both which said fines the said Franz Krause then disputed and ever since hath dis-
9 puted, and no part of either of said fines has been paid.

That said Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, and Frank Pistorio, together with sundry other persons, whose names are to the said Franz Krause unknown, on the seventh day of August, in the year of our Lord one thousand eight hundred and eighty-seven, at the county and District aforesaid, unlawfully and maliciously did combine, conspire, and confederate together to extort from said Franz Krause the sum of seventy-five dollars for and on account of the fines aforesaid, and to prevent the said Franz Krause, Louis Naecker, otherwise called Ludwig Naecker, August Naecker, Charles Arndt, Louis Naecker, Junior, Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Casper Winders, Earnest Arndt, and Christian Feige and each of them from pursuing their said calling and trade and to boycott them, the said last-named fourteen persons, and each of them, and to prevent them, the said last-
10 named fourteen persons, from obtaining employment as musicians or otherwise anywhere in the United States of America, and to injure, molest, oppress, intimidate, and reduce to beggary and want the last-named fourteen persons and each of them and any person who should work with or for them or any or either of them or should employ them or any or either of them.

By refusing to work as musicians or in any other capacity with or for them, the said last-named fourteen persons, or with or for any person, firm, or corporation who should work with or for or should employ the said last-named fourteen persons or any or either of them, and by requesting and procuring all other members of the organizations and associations aforesaid and all other workmen and tradesmen not to work as musicians or in any capacity with or for them, the said last-named fourteen persons, or any or either of them or with or for any person, firm, or corporation who should employ or work with them, the said last-named fourteen persons, or any or either of them,
11 and by warning and threatening every person, firm, or corporation who should employ or propose to employ the said last-named fourteen persons or any or either of them that if such person, firm, or corporation should not forthwith cease to employ and discharge and refuse to employ the said last-named fourteen persons, or such of them as might be so employed or proposed to be employed, such person, firm, or corporation so refusing to discharge or so not refusing to employ would be deprived of any custom or patronage from them, the persons so conspiring, combining, and confederating as aforesaid, and from all other members of the said organizations and associations, and when any person, firm, or corporation should refuse to discharge any of the said last-named fourteen persons or any or either of them or should decide to employ

them by persuading and requiring all other persons dealing with such person, firm, or corporation so refusing to discharge or
12 deciding to employ to cease such dealings, and by threatening every person, firm, or corporation who should in any way give aid and comfort to the said Franz Krause, Louis Naecker, otherwise called Ludwig Naecker, August Naecker, Charles Arndt, Louis Naecker, Junior, Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Casper Windus, Earnest Arandt, and Christian Feige or any or either of them with the enmity and hostility of them, the persons so conspiring, combining, and confederating as aforesaid, and the enmity and hostility of every member of the said organizations in the District of Columbia and in the United States of America; and that the said Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, and Frank Pistorio afterwards, to wit, on the eighth day of August, in the year aforesaid, at the county of Washington, in the District of Columbia, in pursuance of and according to the said conspiracy, combination, and confederacy had as aforesaid, did
13 send and deliver to each of the members of the said "The Washington Musical Assembly," otherwise called "The Washington Musical Assembly, No. 4308, K. of L," and to divers other persons in the District of Columbia, whose names are to the said Franz Krause unknown, a certain printed circular of the tenor following:

SANCTUARY WASHINGTON MUSICAL ASSEMBLY,
4308, K. OF L.,
WASHINGTON, D. C., *August 8th*, 1887.

DEAR SIR AND BROTHER: In accordance with a resolution of this assembly and in compliance with the constitution and by-laws of the order you are hereby notified that the following-named members of this assembly are hereby suspended for having performed with F. Krause, in direct violation of the official notice of said Krause's suspension from this assembly. You will, therefore, not engage *of* perform, directly or indirectly, with any
14 of them—Louis Neacker, August Neacker, Charles Arndt, Louis Neacker, Jr., Herman Feige, Gus. A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Caspar Wintus, Earnest Arndt, Christian Feige.

By order of the assembly.

[SEAL.] E. C. LINDEN, JR.,
Recording Sec'y.

Against the form of the statute in such case made and provided and against the peace and Government of the United States of America.

Wherefore the said attorney of the said United States, who in this behalf prosecutes for the said United States in manner and form as aforesaid, prays the consideration of the court here in the premises, and that due proceedings may be had against the said Edward C.

Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, and Frank Pistorio in this behalf to make their respective answers
15 to the said United States touching and concerning the premises aforesaid.

AUGUSTUS S. WORTHINGTON,
Attorney of the United States in and for the District of Columbia.

Endorsed: No. 16853, criminal doc. 16. United States *vs* Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, Frank Pistorio. Information for conspiracy. Hubert Schutter, Julius Leins, Edward Kolb. Filed Oct. 14, 1887. R. J. Meigs, clerk. Filed in open court. Filed Sep. 9, 1887. Howard L. Prince, clerk police court, D. C.

16 *Information in Police Court.*

In the Police Court of the District of Columbia. September Term, 1887.

UNITED STATES *vs.* EDWARD C. LINDEN, LOUIS P. WILD, JOHN N. PISTORIO, James C. Callan, Joseph B. Caldwell, John Fallon, George W. Sloan, Anton Fischer.	No. 43299.

Information for conspiracy.

Sept. 22, 1887.—Demurrer to information filed and overruled.
Request for jury trial filed and denied.
September 22, A. D. 1887.—Defendants arraigned. Plea, not guilty.
September 23, 1887.—Demurrer withdrawn.
Witnesses examined as follows:
For prosecution, Hubert Schulter, Nicholas Lochbochler, Herman Edel, Christian M. Schneider, Lloyd Moxley, Henry C. Ford, Louis Naecker, Edward Kolb, Theodore Lang, Charles Arndt, Herman Arndt, Julius Eisenbeiss, Julius Leins, Moses B. Frank-
17 lin, John T. Hoffman, Christian Feige, Julius Schultz, August Naecher, Charles F. Kozee, Adam Lockbochler, John P. Plant.
For defence, Stanley Lawton, Joseph H. Allen, Daniel B. Emmich, Caspar Campanini, Joseph B. Caldwell, James C. Callan.
And upon the evidence said defendants, being adjudged guilty as charged in the information, were sentenced to pay a fine of twenty-five dollars each, and in default to be committed to the jail for the term of thirty days each.
From which said judgment the defendants have appealed to the supreme court of the District of Columbia and have entered into

recognizance for the prosecution of said appeal and to abide by the judgment of the said supreme court thereon in the sum of one hundred dollars each.

CHRISTOPHER ARTH, *Surety.*

OCTOBER 14TH, 1887.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceeding had in the police
18 court in the above-entitled cause upon the information therein filed and herewith transmitted.

[SEAL.] HOWARD L. PRINCE,
Clerk of the Police Court of the District of Columbia.

Endorsed: No. 16853, criminal doc. 16. Filed Oct. 14, 1887. R. J. Meigs, clerk.

Warrant of Police Court.

Aff. No. A. D. A.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

To the marshal of the District of Columbia, Greeting:

Whereas Franz Krause hath upon oath before me, judge of the police court of the District of Columbia, declared that during the months of July and August, A. D. 1887, at the county aforesaid, Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallan, Anton Fischer, and Frank Pistorio did unlawfully and wickedly combine,
19 conspire, and agree among themselves to extort from said Krause the sum of seventy-five dollars for and on account of fines imposed upon said Krause by "The Washington Musical Assembly, No. 4308, K. of L.," and to prevent Franz Krause, Louis Neacker, otherwise called Ludwig Neacker, August Neacker, Charles Arndt, Louis Neacker, Junior, Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Casper Windus, Ernest Arndt, and Christian Feige from pursuing their calling and trade of musicians and to boycott them, the last-named fourteen persons, and to prevent the last-named fourteen persons from obtaining employment as musicians or otherwise anywhere in the United States of America, and to injure, molest, oppress, intimidate, and reduce to beggary and want the last-named fourteen persons, against the form of the statute in such case made and provided and against the peace and Government of the United States:

You are, therefore, hereby commanded to take the said Ed-
20 ward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan, Joseph P. Caldwell, George N. Sloan, John Fallan, Anton Fischer, and Frank Pistorio, and bring them before the said police court forthwith to answer said charge.

Witness the Hon. William B. Snell, judge of the police court, and the seal of said court, this ninth day of September, A. D. 1887.

[SEAL.] HOWARD L. PRINCE,
Clerk Police Court, D. C.

Endorsed: No. 16853, criminal doc. 16. Precinct No. —. United States *vs.* Edward C. Linden *et al.* Warrant for conspiracy. *Cepi.* Witness Frank Krause. Filed Oct. 14, 1887. R. J. Meigs, clerk.

21 188–. Plea, guilty. Held to await the action of the grand jury. Bonds, $—.

Recognizance.

In the Police Court of the District of Columbia, the Eighth Day of October, 1887.

THE UNITED STATES
vs.
EDWARD C. LINDEN, LOUIS P. WILD, JOHN N. PISTORIO, JAMES C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer.

On appeal to the supreme court of the District of Columbia.

The defendants and Christopher Arth, their surety, acknowledge themselves to be indebted to the United States, the defendants, in the sum of one hundred dollars and the surety in the sum of eight hundred dollars, lawful money of the United States, to be levied of their and each of their goods and chattels, lands and tene-
22 ments, upon condition, nevertheless, that whereas the said defendants were, on the eighth day of October, 1887, convicted in the police court of the District of Columbia of conspiracy, and it was thereupon adjudged by said court that said defendants pay a fine of twenty-five dollars each and costs, and in default be committed to the county jail for the term of thirty days each; and whereas said defendants have appealed from said judgment to the supreme court of the District of Columbia: Now, therefore, if said defendants shall appear in said supreme court from day to day, at the present or any future criminal term thereof, until the said cause shall be finally disposed of and prosecute said appeal with effect and abide by the judgment of said supreme court thereon, then this recognizance to be void and of no force.

OCTOBER 14TH, A. D. 1887.

I certify that the above recognizance was acknowledged in open court the eighth day of October, 1887, and that the sufficiency of said surety was approved by the judge of said police court.

Witness my hand and the seal of said court.

[SEAL.] HOWARD L. PRINCE,
Clerk of Police Court, District of Columbia.

23 Police Court, District of Columbia, Tenth Day of September, 1887.

Christopher Arth, surety in the within recognizance, being duly sworn, says that he is worth, over and above all his debts and liabilities, the sum of five thousand dollars in real estate situated in the District of Columbia; that a part of the real property so owned by him is described as follows: Premises known as No. 510 on Second street northwest, and is worth the sum of five thousand dollars; that he owns said property in fee simple, free and unincumbered by deed of trust, mortgage, judgment, or otherwise; that he is not surety or responsible on the bond or recognizance of any person whatsoever.

C. ARTH.

Witness:
N. C. HARPER.

Subscribed and sworn to before me this tenth day of September, 1887.

[SEAL.] JOSEPH HARPER,
Dep. Clerk Police Court, D. C.

24 Endorsement: No. 16853, criminal doc. 16. No. 43299. Police court of the District of Columbia. Recognizance on appeal to the supreme court. The United States *vs.* Edward C. Linden *et al.* $800. Christopher Arth, surety. Taken the eighth day of Oct., 1887. ——— ———, clerk police court, D. C. Filed Oct. 14, 1887. R. J. Meigs, clerk.

Motion to Quash Information.

In the Police Court of the District of Columbia.

UNITED STATES *vs.* WILD *et al.*

Now come the defendants, by their attorneys, and move to quash the information herein, for that it does not set out a conspiracy to do an illegal act or to do a legal act by illegal means and because it is uncertain and because it charges or purports to charge two separate offences.

C. S. MOORE.
J. H. RALSTON,
Def'ts' Attorneys.

Endorsed: No. 16853, criminal doc. 16. Motion to quash information. Filed Oct. 14, 1887. R. J. Meigs, clerk.

25 *Plea of Not Guilty and Prayer for Jury Trial.*

In the Police Court of the District of Columbia.

UNITED STATES
vs.
LOUIS P. WILD, EDWARD C. LINDEN, JOHN N. PISTORIO, JAMES C. Callan, Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, Frank Pistorio.

Now comes the defendants, each for themselves and in their proper person-, and declare that they are not guilty of any of the matters and things charged in the information filed in this cause by the attorney for the United States, and, so declaring, demand that the crime charged be investigated by a jury, and that each of them, the defendants, be tried by a jury of twelve men residents of the District of Columbia.

[Seal Supreme Court of the District of Columbia.]

LOUIS P. WILD.
GEO. SLOAN.
JOSEPH B. CALDWELL.
JOHN N. PISTORIO.
JOHN FALLON.
JAMES C. CALLAN.
ANTHONY C. FISCHER.
H. D. PISTORIO.

26 [Endorsed:] 43299. United States *vs.* Louis P. Wild *et al.* Information for conspiracy. Demand for jury. No. 16853, criminal doc. 16. Filed Oct. 24, 1887. R. J. Meigs, clerk.

A true copy.
Test:

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Cl'k.*

27 *Commitment of S. C. D. C.*

In the Supreme Court of the District of Columbia, Holding a Criminal Court, November 16, 1887.

UNITED STATES
v.
JAMES C. CALLAN. } No. 16853.

From police court on appeal. Information for conspiracy.

Come as well the attorney of the United States as the defendant in proper person, in custody of his surety, Christopher Arth, who, in open court, surrenders the defendant, and prays to be dismissed and exonerated upon his recognizance as surety for the appearance of the said defendant; whereupon it is considered that the said prayer of the said surety be, and it is hereby, granted; and there-

upon, the defendant in open court having withdrawn his appeal taken in this case from the judgment of the police court, it is ordered that he be committed to the custody of the marshal that the sentence of the said police court herein may be carried into effect.

M. V. MONTGOMERY,
Asso. Justice.

28 *Order Directing Writ to Issue. Filed Nov.* 16, '87. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, Holding a Criminal Court, November 16th, 1887.

In the Matter of JAMES C. CALLAN. No. 16889. Criminal docket 16. *Habeas corpus.*

Upon motion of Charles S. Moore and J. H. Ralston, counsel for the petitioner, James C. Callan, it is hereby ordered that a writ of *habeas corpus* be issued herein, as prayed for in the petition, returnable before me forthwith.

By the court:

M. V. MONTGOMERY,
Asso. Justice.

29 *Return to Writ of Habeas Corpus.*

In the Supreme Court of the District of Columbia.

In the Matter of the Application of JAMES C. CALLAN for Writ of *Habeas Corpus.*

For the return to the within writ this respondent now here produces the body of the said James C. Callan, and for cause of his detention says that he holds the petitioner in custody under and by virtue of a certain order passed by the supreme court of the District of Columbia, holding a criminal term, on the 16th day of November, 1887, in the case of the United States *vs.* James C. Callan, No. 16853, a copy of which is hereto annexed and made part hereof; and, further, under and by virtue of a judgment of the police court of the District of Columbia in case No. 43299, of the United States *vs.* James C. Callan *et al.*, a copy of which is annexed to the petition for the issue of this writ and is hereby referred to and made part hereof.

That this respondent was in the act of conveying the petitioner to the United States jail of the District of Columbia, there to be
30 imprisoned in accordance with the terms of the said judgment of said police court in default of the payment of the fine imposed by said judgment, when the within writ was served upon this respondent.

A. A. WILSON,
U. S. Marshal, D. C.

31 In the Supreme Court of the District of Columbia, Holding a Criminal Court, November 16, 1887.

UNITED STATES
vs.
JAMES C. CALLAN. } No. 16853.

From police court on appeal. Information for conspiracy.

Come as well the attorney of the United States as the defendant in proper person, in custody of his surety, Christopher Arth, who, in open court, surrenders the defendant and prays to be dismissed and exonerated upon his recognizance as surety for the appearance of the said defendant; whereupon it is considered that the said prayer of the said surety be, and it is hereby, granted; and thereupon, the defendant in open court having withdrawn his appeal taken in this case from the judgment of the police court, it is ordered that he be committed to the custody of the marshal that the sentence of the said police court herein may be carried into effect.

M. V. MONTGOMERY,
Asso. Justice.

32 DISTRICT OF COLUMBIA, *To wit:*

The President of the United States to the marshal of the United States in and for the District of Columbia, Greeting:

You are hereby commanded to have the body of James C. Callan, detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable M. V. Montgomery, one of the justices of the supreme court of the said District, holding the criminal court, at the United States court-house, Washington city, immediately (on the 16th day of November, 1887) after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf, and have then there this writ.

Witness E. F. Bingham, chief justice of said supreme court, the 16th day of November, 1887.

[Seal U. S. S. C., D. C.]

R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS, *Ass't Clerk.*

33 *Recognizance. Christopher Arth, Surety.*

In the Supreme Court of the District of Columbia, the 16th day of November, 1887.

In Re JAMES C. CALLAN. No. 16889.

The petitioner and Christopher Arth, his surety, acknowledge themselves indebted to the United States in the sum of $100, to be levied of their and each of their lands and tenements, goods and chattels, if the petitioner fail to appear before the criminal court of

the District of Columbia, from day to day, at the present June term thereof, 1887, and the subsequent terms, and abide the order and judgment of this court in this behalf, or if he depart the court without leave.

Test: R. J. MEIGS, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk*.

34 *Motion for Discharge under Petition & Return. Filed Nov.* 16, 1887. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, Sitting as a Criminal Court.

In the Matter of the Application of JAMES C. CALLAN for Writ of *Habeas Corpus*. No. —.

Upon the return of the writ herein petitioner, by his counsel, moves discharge of said James C. Callan for reason set out in petition.

JAMES C. CALLAN,
By CHARLES S. MOORE,
J. H. RALSTON,
His Counsel.

35 *Certified to General Term.*

NOV. 16TH, 1887.

I hereby certify the within writ and the questions made thereby to the court in general term for hearing in the first instance.

M. V. MONTGOMERY, *Justice.*

36 *Order in General Term.*

In Re JAMES C. CALLAN upon *Habeas Corpus*. No. 16889. Criminal docket.

This cause having been certified from the special term, criminal court, to be here heard in the first instance upon the petitioner's application for discharge from custody and set at liberty, and being submitted thereon, it is considered that the prayer of the petitioner be, and hereby is, refused; from which decision the petitioner in open court, by his attorney, J. H. Ralston, prays and is allowed his appeal to the Supreme Court of the United States.

37 *Filed Nov.* 26, 1887. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, the 26th day of November, 1887.

JAMES C. CALLAN
vs.
A. A. WILSON, Marshal. } No. 16889.

In error.

Know all men by these presents that we, James C. Callan, as principal, and Christopher Arth, as surety, are bound unto the above-named A. A. Wilson in the sum of five hundred ($500.00) dollars, to be paid to the said A. A. Wilson, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of November, 1887.

Whereas the above-named James C. Callan hath prosecuted his appeal to the Supreme Court of the United States to reverse the judgment rendered Nov. 23, 1887, in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named James C. Callan shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES C. CALLAN. [SEAL.]
CHRISTOPHER ARTH. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Bond and surety approved Nov. 26, 1887.

E. F. BINGHAM,
C. J. S. C., D. C.

38 *Citation upon A. A. Wilson, Marshal, to Appear before S. C. U. S., and Acknowledgment of Service. Filed Nov.* 26, 1887. *R. J. Meigs, Clerk.*

DISTRICT OF COLUMBIA, *ss:*

To A. A. Wilson, marshal, defendant:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to appeal allowed and filed in the clerk's office of the supreme court of the District of

Columbia, wherein James C. Callan is plaintiff and you are defendant, to show cause, if any there be, why the judgment on the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness my hand this 26th day of November, A. D. 1887.

E. F. BINGHAM,
Chief Justice of the said Supreme Court of the District of Columbia.

Service of the above citation, by copy, acknowledged this 26th day of November, A. D. 1887.

[Seal Supreme Court of the District of Columbia.]

A. A. WILSON, *Marshal.*

39 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 28 day of November, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 28 day of Nov., 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

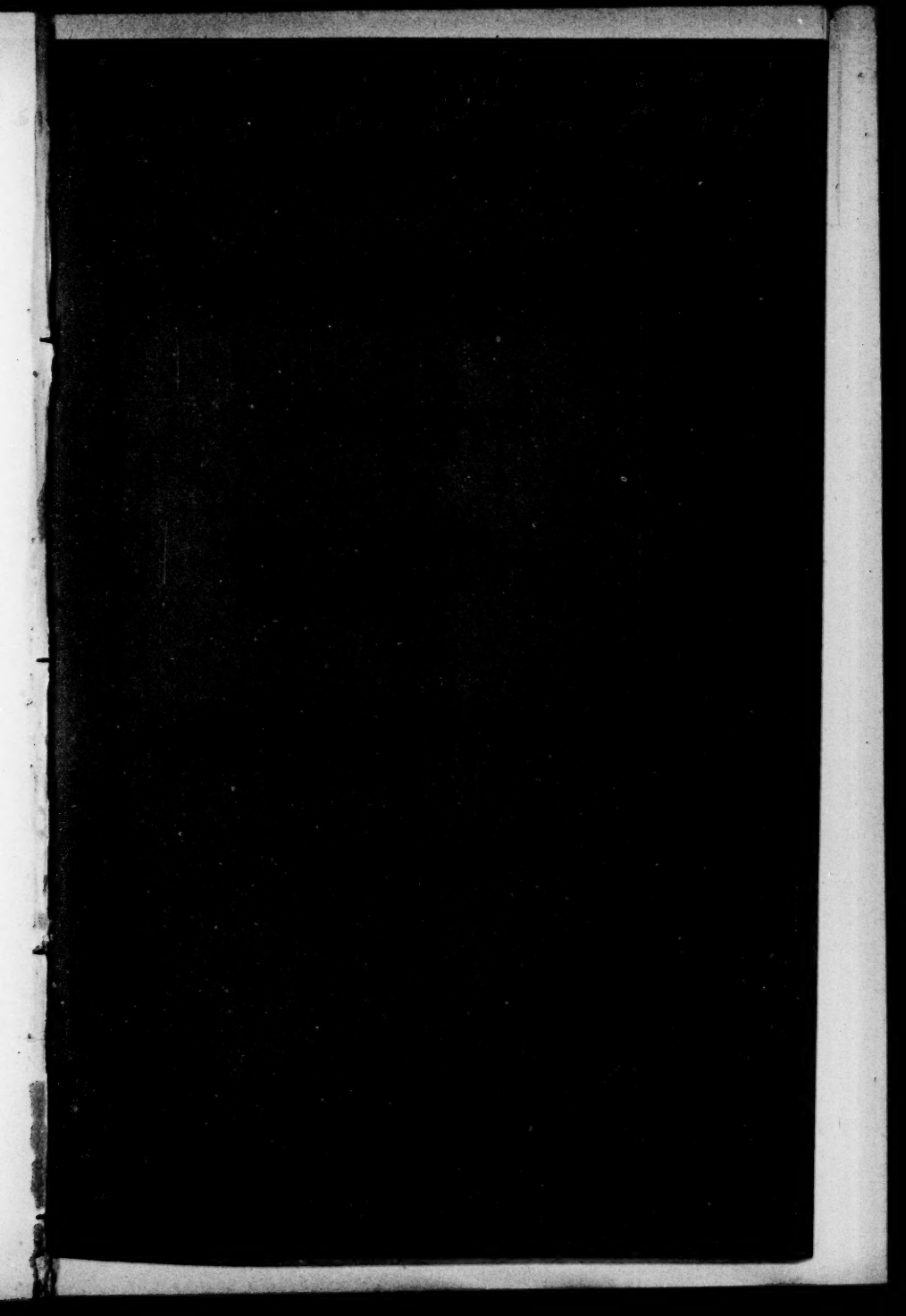
Witness my hand and the seal of said court this 28 day of November, 1887.

[Seal Supreme Court of the District of Columbia]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 1318. James C. Callan, appellant, *vs.* A. A. Wilson, marshal. Filed November 28, 1887.



Witness my hand and the seal of said court this 28 day of November, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 1318. James C. Callan, appellant, *vs.* A. A. Wilson, marshal. Filed November 28, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

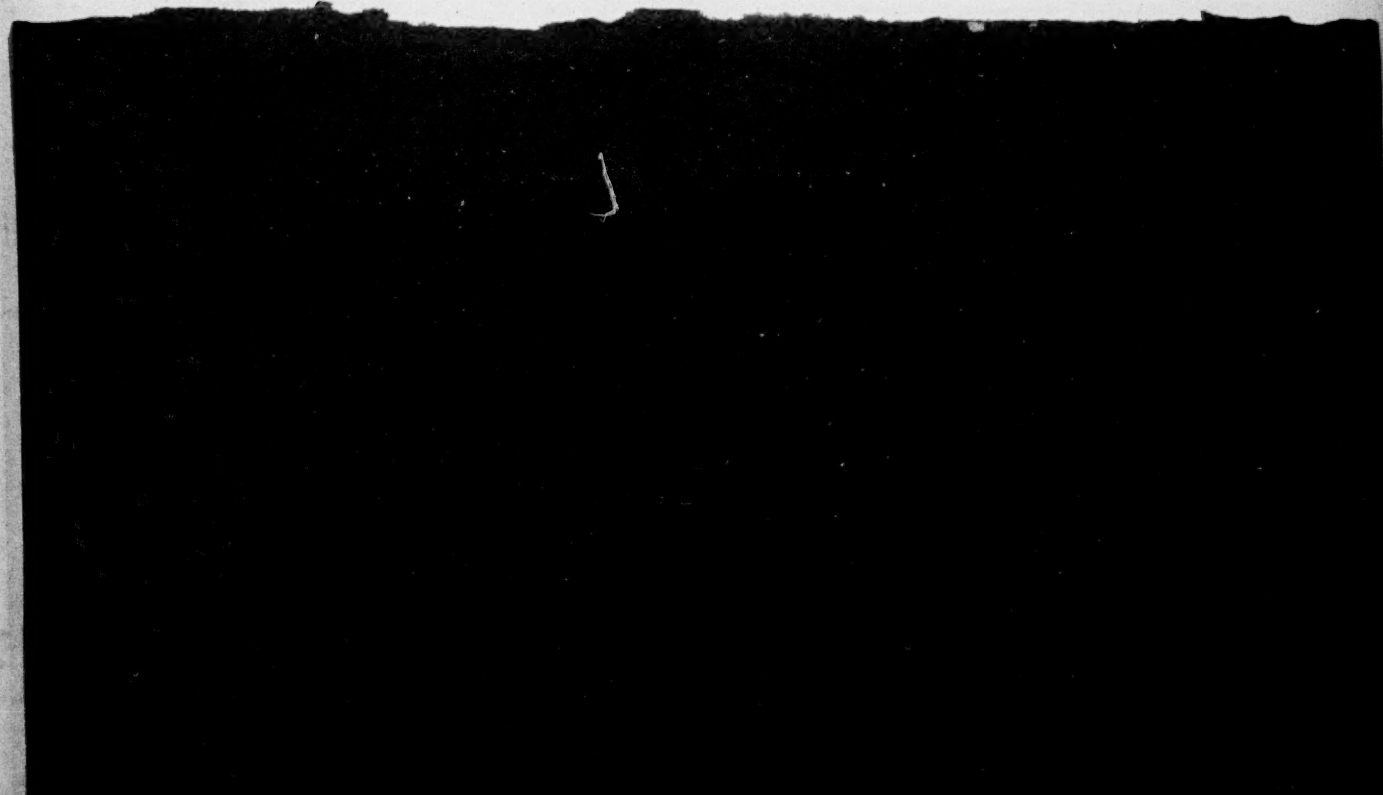
JAMES C. CALLAN, Appellant,
vs.
A. A. WILSON, Marshal. } No. 1318.

Application for Writ of Habeas Corpus.

BRIEF FOR APPELLANT.

J. H. RALSTON,
CHAS. S. MOORE,
Counsel for Appellant and Petitioner.

Washington, D. C.:
Press of Bass & Warren, 505 D street.



In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, Appellant,
vs.
A. A. WILSON, Marshal. } No. 1318.

Brief for Appellant.

Statement of the case.

The record shows that the appellant was on September 9, 1887, charged, with eight others, in the Police Court of the District of Columbia with the crime of conspiracy; that on September 22, 1887, he was arraigned in said court on said charge, he and his co-defendants pleaded not guilty and asked for a jury-trial, which the judge of said court denied them; that he was tried and, with seven of his co-defendants, was convicted of said crime on the 8th of October, 1887, and sentenced to pay a fine of twenty-five dollars, and in default to be committed to the jail for thirty days; that he appealed to the Supreme Court of the District of Columbia, and gave bond to prosecute his appeal there; that on the 16th day of November, 1887, his surety surrendered him in the Supreme Court of the District of Columbia, he withdrew his appeal to that court and he was at once committed to the custody of the marshal that the sentence of the said Police Court herein might be carried into effect; that on the same day he prayed for a writ of habeas corpus for the reasons that he was not indicted of said crime by a grand jury, nor was he tried by a

lawful jury, and because he was deprived of his constitutional right to a speedy trial and was tried before a court not created in accordance with the United States Constitution, and because the penalty was not imposed upon a conviction upon an indictment found by a grand jury, nor had said Police Court jurisdiction to hear and determine the matter and things set out in the said information, nor was the penalty imposed upon the verdict of a jury; that said writ was granted by a special term of the Supreme Court of the District of Columbia on said day and a return made by the defendant herein that he held the petitioner by the said Police Court judgment and the order of the Supreme Court of said District, which order is above referred to; that his discharge was thereupon prayed and the questions arising thereon certified to the General Term of the Supreme Court of said District, which, on November 23, 1887, denied his prayer, whereupon he appealed to this court.

GROUNDS OF APPEAL.

The Supreme Court of the District of Columbia erred in not discharging petitioner.

I. Because he was not convicted upon an indictment or presentation by a grand jury, the offense with which he was charged being infamous.

II. Because he was not granted a speedy trial within the meaning of the Constitution.

III. Because he was tried by a judge not appointed for good behavior, in accordance with the provisions of the Constitution.

IV. Because he was not tried by a jury as prescribed by the Constitution of the United States.

ARGUMENT.

I.

The crime of conspiracy is an infamous crime, and being such is only cognizable upon indictment or presentation by a grand jury. Its common-law character is shown by Priddle's Case, hereinafter referred to. See also United States *vs.* Buell, 1 MacArthur, 502. The last case establishing the infamy by

showing the possibility of imprisonment in the penitentiary for an offense of similar grade.

II.

Speedy trial within the meaning of the Constitution must mean a speedy legal trial—in trial observing legal rights. If a man is forced to submit to a trial without jury and go through that before he may have a trial by jury, it is evident that in no fair sense has he received a speedy trial. Delays are incident to justice; but unnecessary delays should not be made by statute, as has here been the case.

III.

The Police Court of the District of Columbia, so far as crimes against the United States are concerned, is a United States court, and its judge should therefore be appointed during good behavior, as directed by the Constitution, instead of for a term of six years.

Its jurisdiction and attributes prove this. Sec. 1049, R. S. D. C., reads:

"The police court shall have original and exclusive jurisdiction of all offenses against the United States committed in the District not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and ordinances of the District in force therein."

In addition this court by other sections is given a clerk, bailiffs, a seal, power to enforce its processes, &c.

The Constitution provides that—

"The judicial power [of the United States] shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, &c; * * to controversies to which the United States shall be a party," &c.

This clause of the Constitution is interpreted in the Federalist (p. 587):

"It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st. To all those which arise out of the

laws of the United States passed in pursuance of their just and constitutional powers of legislation; * * * 3d. To all those in which the United States are a party."

In the present case the petitioner was charged with a common-law offense, made a crime in this District by virtue of the congressional enactment taking jurisdiction hereof. Again, the United States is the accuser. It seems plain therefore that the offense is one over which only a United States court can have jurisdiction, and if the Police Court be not constituted as such its assumed jurisdiction is void.

It may be argued that Congress, having an admitted authority to establish for the Territories such tribunals, as to term of service of their judges, as it may see fit, therefore the same power extends to the District of Columbia. This necessitates an examination of congressional powers over the Territories, and of the difference between such power and like jurisdiction over the District.

The Constitution provides that—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

The whole clause indicates that the framers had in view property rights rather than any jurisdictional question. The rules and regulations "were respecting the territory or *other* property belonging to the United States," and the proviso concerned "claims." The wording indicates reference to some antecedent possession, and the historical view also sustains this interpretation. (*Vide* Scott *vs.* Sandford, 19 How. 436.)

When the validity of certain territorial courts not appointed in the constitutional manner was first questioned before the Supreme Court (Am. Ins. Co. *vs.* Canter, 1 Peters, 546) Chief Justice Marshall said: "The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power

conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

But, as shown in Scott *vs.* Sandford, *supra*, the power to make rules and regulations respecting the territory belonging to the United States refers to United States property, and we are therefore compelled to believe that the territorial courts are extra-constitutional, and exist by virtue of the general right of sovereignty inherent in Congress. (See also Pollard's Lessee *vs.* Hagan, 3 Howard, 223, where the difference between congressional rule over the Territories and the District of Columbia is recognized.) It is true that some decisions of the United States Supreme Court speak as if such courts were established by virtue of the constitutional provision, but examination shows that a determination of this particular question was not involved in such decisions, and they are all based upon Am. Ins. Co. *vs.* Canter, *supra*.

If, therefore, we are compelled to look beyond and outside the Constitution for authority for congressional supervision over the territorial courts, such authority can afford no precedent in a jurisdiction expressly provided for by the Constitution. This instrument provides that Congress shall have power—

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

This power of "exclusive legislation" cannot mean that in

the District of Columbia Congress may override any constitutional provision. It cannot mean that there either personal rights or administrative methods guaranteed by the Constitution may be violated. Certainly Congress may not for the District pass any bill of attainder or collect duties in a manner not uniform with the rest of the United States, or have its laws interpreted by judges who do not hold during good behavior. (See opinion of Justice Kilty in 3 Cranch, 159, Moore *vs.* U. S., note.)

And this brings us to a point of practical difference between congressional control over the District and over the Territories. Over the former congressional legislation is constitutionally "exclusive;" over the latter usually Congress simply exercises paramount control, and this, as we have seen, outside the Constitution. (The founders of the Constitution never contemplated that the citizens of the District should control their affairs except as to municipal matters. In the Federalist (p. 339) we read: "As a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them.")

There can, therefore, be no pretense that the Police Judge of the District of Columbia, interpreting United States laws, is anything but a United States judge, and to be appointed during good behavior. A conviction before a judge appointed for any other term would be void. *In re* Milligan, 4 Wallace, 122, the court say:

"One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."

We do not wish to be understood as denying the authority of Congress to establish within the District of Columbia, in such manner and for such periods as it may deem best, tribunals for the trial of strictly municipal offenses, nor to impugn the powers of the present Police Judge so far as violations of local ordinances are concerned. Courts of this nature

have never been conceived as forming part of a judicial system within the constitutional meaning. (State *vs.* Young, 3 Kansas, 445; Shafer *vs.* Mumma, 17 Md., 331.) The jurisdiction of such courts was discussed and defined by Mr. Justice Strong, late of this court, in Byers *vs.* Commonwealth, 42 Pa. State, 89. But it has never been pretended that conspiracy was a mere municipal offense. At common law it was deemed of so grave a nature as to be in itself infamous. (Priddle's case, Leach's Crown Cases, p. 349.) However proper it might be, therefore, to sustain the Police Court as a purely municipal court, when viewed as a court administering the public law of the country, it must be differently regarded.

IV.

The constitutional provisions as to jury trial were violated when the Police Judge refused to petitioner a jury.

The clauses in the Constitution referring to the subject are as follows:

Article III, Sec. 2. * * "The trial of all crimes, except in cases of impeachment, shall be by jury." * * * *

Fifth Amendment.—"No person * * shall * * be deprived of life, liberty, or property, without due process of law."

Sixth Amendment.—"In *all* criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The Federal courts have been three times called upon to determine the constitutionality of the Police Court and of its methods. The first occasion was before Judge Blatchford in an application for a warrant to issue for Charles A. Dana to be tried by this Police Court. (7 Ben. 1.)

Judge Blatchford refused the application and in the course of his remarks said:

"The act of 1870 [establishing the Police Court] provides that the information in this case shall not be tried by a jury,

but shall be tried by the court. It is true that it gives to the defendant, after judgment, if he deems himself aggrieved thereby, the right to appeal to another court, where the information must be tried by a jury. But this does not remove the objection. If Congress has the power to deprive the defendant of his right to a trial by jury for one trial, and to put him, if convicted, to an appeal to another court to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court without a jury on several successive convictions before allowing a trial by jury. In my own judgment the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

In Cooley on Constitutional Limitations (p. 513, note, 4th ed.) the author refers to Judge Blatchford "very sensibly" remarking as given above.

The second case was that of United States *vs.* Buell, 1 MacArthur, 502, where three out of five judges held the Police Court incompetent to try anything but police cases. The two remaining judges expressed no opinion upon this point.

The third case in which this point is referred to is *Ex parte* Fry, (3 Mackey, 137,) where the Supreme Court of the District of Columbia say:

"If the Police Court were just entering upon its existence we should feel bound to consider this question, and perhaps should consider it with some prepossession in favor of the position taken by the prisoner. But that court has been in existence nearly fourteen years; its jurisdiction has been acquiesced in, and this is the first time that it has been formally assailed before this court. * * We shall, therefore, decline to enter upon the examination of this question at the present time, and pass the prisoner on to the Supreme Court of the United States, if he thinks proper to appeal to that tribunal on this question."

The prisoner was unable to appeal further and hence suffered a denial of his constitutional rights.

The State reports shed little light on the exact controversy here. Laying aside for the moment the differences in State constitutions under which they have been decided, the various cases which, from time to to time, have been cited as supporting the contention of the government may be divided into three classes:

First. Purely civil cases, holding that when an appeal is allowed from a court having no jury to a court having one, and no unreasonable condition is attached to the appeal, the right to trial by jury is sufficiently preserved.

Second Cases of violation of municipal ordinances, holding that when an unfettered and untrammeled appeal is allowed from a municipal court having no jury to a court having one, the right to jury trial is preserved.

Third. Cases holding in respect of criminal cases a like doctrine to that stated as to cases of the second class.

The doctrine of cases of the first class is illustrated by Reckner *vs.* Warner, 22 Ohio, (N. S.) 275; State *vs.* Brennan's Liquors, 25 Conn. 278; Beers *vs.* Beers, 4 Conn. 535; Steuart *vs.* Baltimore, 7 Md. 500; Biddle *vs.* Commonwealth, 13 S. & R. 405.

It is to be noted that the Ohio and Connecticut Constitutions provide that the right to trial by jury is to remain inviolate. and the Pennsylvania Constitution prescribes that right of trial by jury shall be as heretofore. The decisions upon the point in question in these and other States have hinged upon the fact that the constitutional right was not an unqualified one, but was to be measured by antecedent practices. It is also to be noted that while the Connecticut cases above referred to were civil ones, they were afterwards used as precedents for the enforcement of criminal prosecutions in Massachusetts, and this notwithstanding the fact that in Connecticut criminal prosecutions are governed by a clause in the constitution providing that "in all prosecutions by indictment or information" the

accused shall be entitled to "a speedy trial by an impartial jury." The irrelevancy of such a citation must be manifest.

Illustrative of the second class of cases are Emporia *vs.* Volmer, 12 Kansas, 622; McGear *vs.* Woodruff, 33 N. J. (Law) 213; and cases cited in Dillon on Municipal Corporations, sec. 411, (3d edition.)

These cases generally rest upon constitutional provisions similar to those of the first class, and many expressly and all tacitly declare and admit that offenses against municipal ordinances are not criminal offenses. Much of their reasoning denying a jury trial in the first instance rests upon the fact that these offenses not being criminal in their nature or in the manner of their prosecution (as the case may be) do not call for a jury trial, at least in the first instance. It is to be borne in mind that municipal courts do not form part of the judicial system provided by the respective State constitutions, and which alone are empowered to try criminal offenses against the State. State *vs.* Young, 3 Kansas, 445; Shafer *vs.* Mumma, 17 Md. 331.

The principal case of the third class is Jones *vs.* Robbins, 8 Gray, 342. Upon this, all subsequent Massachusetts decisions rest. It is therefore important to examine this, both as to its reason and its basis of authority. (But before commencing such examination, we may say that upon the principal point involved in Jones *vs.* Robbins, it has been overruled by this by this court in Hurtado *vs.* California, 110 U. S. 516.)

First. As to its authority. It rests upon Emrick *vs.* Harris, 1 Binney, 416, a civil case involving the constitutionality of an act enlarging the jurisdiction of justices in Pennsylvania; Murphy *vs.* People, 2 Cowen, 815, which decided that an act conferring jurisdiction upon justices of the peace to try petty larceny cases was not unconstitutional, such cases being before tried without a jury and the Constitution only guaranteeing tried by jury "where it hath heretofore been used in the colony of New York;" Jackson *vs.* Wood, 2 Cowen, 819, which touches the competency of a witness convicted of petty

larceny, in the course of the decision of which case Mr. Justice Walworth said that if the amendments to the *Constitution of the United States* "were applicable to criminal prosecutions under State laws the witness was convicted of an infamous crime without a presentment or indictment by a grand jury and was *deprived of the benefit of a jury trial;*" and lastly, upon Sullivan *vs.* Adams, 3 Gray, 477, a case in which the point before us was not in question.

Secondly. As to the reasoning upon which it is based. Chief Justice Shaw said that—

"In considering constitutional provisions, especially those embraced in the Declaration of Rights and the amendments to the Constitution of the United States in the nature of a bill of rights, we are rather to regard them as the annunciation of great and fundamental principles to be always held in regard, both morally and legally, by those who make and those who administer the law, under the form of government to which they are appended, than as precise and positive directions and rules of action, and therefore in construing them we are to look at the spirit and purpose of them as well as to the letter."

True as it is that we should look at the "spirit and purpose" of such provisions at some time or for some purposes, we do not believe ourselves at liberty to disregard the plain letter and substitute a search after the more or less elusive "spirit." The spirit is to be sought for, we believe, only when the letter is doubtful, and such is not the present case. There may be as many different constructions as to the spirit as there are different judges. One man may consider eleven jurors a jury within the Constitution if governed by his conception of its spirit; another would find no objection to thirteen; a third would deem two juries of six equivalent to one of twelve, and so on. The other points referred to by the Chief Justice as to the right to jury trial being sufficiently preserved by freedom of appeal and as to treating such a trial as this as equivalent to a preliminary hearing, we shall hereafter discuss.

It is to be borne in mind that many of the Massachusetts

cases holding the doctrine laid down in Jones *vs.* Robbins, *supra*, were cases involving municipal offenses, although running in the name of the State, according to the Massachusetts practice, and are therefore cases of the second class mentioned, rather than of the third, under which their titles would naturally place them.

If we leave Massachusetts the only case broadly holding the doctrine laid down by Mr. Justice Shaw is that of State *vs.* Everett, 14 Minn. 439. This was an action for obstructing a highway, and therefore coming under what are called the police powers of the State rather than under its criminal jurisdiction. However general the language of the decision, this fact, coupled with the further fact that one case upon which it rests (Greene *vs.* Briggs, 1 Curtis C. C. Rep.) is a case *in rem* rather than a criminal case, and the two remaining cases cited (Saco *vs.* Wentworth, 37 Maine, 165, and Saco *vs.* Woodson, 39 Maine, 258) are municipal cases, justify us in regarding it also as a case of the second class. There are stray dicta by judges of other States, but the argument in favor of the position of the Government can be very fully found in the cases cited.

There is as little authority in State courts directly denying the doctrine of cases of the third class as there is supporting such doctrine. And the obvious reason for this is that usually the constitutional declaration of the right of trial by jury has been so decided that it has rarely entered the mind of man that it could be evaded. So it has been that, except in Massachusetts, few, if any, police courts have been given jurisdiction over criminal cases, and where they have existed, it may well have been the case, as in this District, that for years no one suffering from them has been able to attack them in such manner as to settle this question.

Police courts offer that invasion of the right of trial by jury mentioned by Blackstone when he said (4 Com. 349): "The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open

attacks, (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by *justices of the peace, commissioners of the revenue, and courts of conscience.*"

We are for the most part driven to look at the general principles surrounding and governing jury trials to arrive at a correct conclusion of the present inquiry.

Upon the question of the right of trial by jury under the Constitution the Supreme Court of the United States expressed its opinion through Mr. Justice Davis in *Ex parte* Milligan, 4 Wall. 122.

Mr. Justice Davis said:

"Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution, and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army or navy or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury'—language broad enough to embrace *all persons and cases.*" * * * *

After referring to the exception as to those in military and naval service the court add:

"Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons* [italics in decision,] citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable

privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; *it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.*"

In many other cases the United States Supreme Court has recognized the importance of a jury trial. In Hodges *vs.* Easton, 106 U. S., 412, Mr. Justice Harlan, speaking for the court, says:

"It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived the right, but it could not be taken away by the court. * * * It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

(This was a civil case, and that the rule in criminal proceedings forbids even a waiver will appear from authorities to be cited and from the language of the Supreme Court of Georgia. In Flint River Co. *vs.* Foster, 5 Ga. 206, this court observes: "And courts will watch with more jealousy any departure from or trespass upon trial by jury in the latter [criminal] class of cases than the former.")

Again, in Baylis *vs.* Travellers' Ins. Co., 113 U. S. 321, Mr. Justice Matthews, speaking for the court, says:

"The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court in entering a judgment against him on its own view of the evidence without the intervention of a jury. In this particular we think error has been well assigned. * * * This constitutional right this court has always guarded with jealousy."

And the decisions of the United States Supreme Court teem with similar expressions favorable to true liberty.

And the right to trial by jury in criminal cases has been considered of such importance that the accused himself could not waive it; he could not consent to be tried by less than twelve men, and any verdict against him brought by less or more than twelve men has been considered void. People *vs.* O'Neil, 48 Cal. 257; Bell *vs.* State, 44 Ala. 393; Jackson *vs.* State, 6 Blackf. (Ind.) 461; Cancemi *vs.* People, 18 N. Y. 128; Carpenter *vs.* State, 4 Howard, (Miss.,) 163; Rowles *vs.* State, 5 Sneed, 360; Norval *vs.* Wise, 2 Wis. 22; Doebler *vs.* Commonwealth, 3 S. & R. 236.

A criminal proceeding has been considered *in invitum*, and so absolutely hostile that the element of consent could not enter into its main constituents. How much less, then, can a trial be considered valid where there has been no consent—where the prisoner has stood upon his legal right? And this legal right was given him for his absolute protection in any criminal action brought against him. As was remarked by Mr. Justice Johnson in Bank of Columbia *vs.* Okely, 4 Wheat. 235:

"As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes written and spoken with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights, and distributive justice."

This, then, is the petitioner's prayer: that in the language given he may be "secured from the arbitrary exercise of the powers of government;" that to this end he may have his constitutional right.

It is of no avail to say that he might have had his appeal. The fact remains that he is now sentenced to jail by a court having no jury. That he might have gone elsewhere to seek a constitutional right guaranteed him without the necessity of his application, is not to the point. He gave the court no privilege to try him without a jury. He did not select his forum.

The United States could have in the first instance taken him to a court with a jury. It is true here, as in the misdemeanor case of Wynehamer *vs.* People, (13 N. Y. 487,) "that the criminal proceeding in a court of special sessions authorized by the said act is unconstitutional and void, because the accused is thereby deprived of the right of trial by jury guaranteed by the Constitution."

We are told that the unqualified right of appeal given our client preserved intact his right to a trial by jury. But we conceive the question in this case to be, not whether by independent action he might still obtain his right, but whether he has already had the right he should have had. If he has not received the benefit of the constitutional privilege at the time he should have received it, his lost right cannot be restored by any subsequent trial. He can claim his freedom because he has been unlawfully convicted.

Mr. Justice Thomas, in his dissenting opinion in Jones *vs.* Robbins, p. 350 *et seq.*, well says:

"That it is not an unobstructed and unclogged right of appeal which the twelfth article secures, but an unobstructed and unclogged *right of trial by jury.*"

Can an appeal render valid an act which without it would be confessedly unlawful? If it can, then we have the peculiar spectacle of a void act rendered valid by the offer of facilities for an escape from its consequences. We have an act not justified by the Constitution, not justified by any private cession of rights, rendered constitutional by the degree of ease with which one can go to a place where his rights will be preserved. As well might a congressman justify himself for voting for an *ex post facto* law or bill of attainder upon the plea that the courts were open for the correction of any mischief done.

Nor is it in any degree true that conviction with an unqualified right of appeal inflicts no wrong. The right of appeal does not do away with the disgrace of conviction. It does not repay the loss of time and money incident to a forced and un-

necessary trial. It does not restore one to his former position of respect among his fellows.

An unwarranted conviction leaves a man crippled in reputation, in money, in spirits, in everything essential to meet his accusers upon a fair plane. An appeal cannot restore these things to him.

Nor can it be true, as argued by Mr. Justice Shaw, that if the prisoner appeal from such a conviction the trial without a jury is justified by being regarded as a preliminary hearing, inasmuch as the prisoner would simply, if he gave bail, be bound over to appear at a term of a court having a jury. In other words, the Chief Justice argues, if the man accepts his conviction he is a duly adjudged criminal; if he appeal from it, he has simply undergone a preliminary hearing This seems like an attempt to perform the fabled feat of "hitting if a deer and missing if a calf." If a prisoner were notified in advance that at his option he could regard his trial as a determination of the charge in question or as a preliminary hearing, this view might be excused. Every lawyer frequently finds it necessary to treat trials and hearings from different points of view if he would preserve his clients' rights, and when, as in this case, his clients are forced to trial, they may have rights and privileges taken from them that he would have been able to retain had they been going through what he knew in advance to be simply a preliminary hearing.

Is it not time that such a court as the Police Court—unconstitutional in its formation and unconstitutional in its methods—should cease to exist by virtue of its character being authoritatively declared? For seventeen years it has placed poor men charged with crime at the mercy of a single judge—subject to his passions, prejudices, and caprices. And in saying this we do not wish to imply that the present judge is worse than another might have been in his place. A short exercise of arbitrary power would corrupt the best of men, and in the present case power is wielded without any supervision, and without the opportunity of comparison of views with others

learned in the law. There is no appellate court to grant a new trial compelling the judge to correct his errors. His is a totally irresponsible position.

In the time of King Alfred forty-four judges were hanged for doing injustice, and many of them for depriving men of a fair trial by jury. Yet this same offense is committed daily under the guise of law and in the capital city of a nation priding itself upon its freedom and in a court established by Congress.

The poor are the sufferers from this tribunal. The rich can take an appeal to the Supreme Court of the District. It is the poor who ask justice at your hands, and their poverty is the reason why this question has never before been brought to this tribunal.

J. H. RALSTON,
CHAS. S. MOORE,
Attorneys for the Petitioner.

4-5-40

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, *Appellant*,
vs.
A. A. WILSON, *Marshal*.
} No. 1318.

Additional Brief of Appellant.

I.

The right to trial by jury in the Police Court of the District of Columbia is absolute. Even under the Sixth Amendment to the Constitution, the accused cannot waive the right. The public has the same interest in the matter as in his presence at the trial, and in Hopt *vs.* Utah, 110 U. S., 579, upon this point, it is said:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. 'The natural life,' says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.'—Bl. Com. 133. The

public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings, involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind.—4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

II.

The brief of the Assistant Attorney General suggests that the Sixth Amendment does not apply to the District of Columbia. If this position be correct it must also be true, from the wording of the amendment, that it does not apply to the territories.

But in Reynolds *vs.* United States, 98 U. S., on page 158 (being a case coming up from the Territory of Utah), the Supreme Court expressly recognized one provision of this Amendment as being in force in Utah. A similar recognition is involved in Hopt *vs.* Utah, *supra*.

J. H. RALSTON,
Attorney for Appellant.

4-5-00

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, Appellant,
vs.
A. A. WILSON, Marshal. } No. 1318.

Now comes the appellant by his counsel, J. H. Ralston, and moves this honorable court to so advance the above entitled cause upon the docket as to secure a speedy hearing, and for reason for this application says—

That this proceeding is upon a writ of *habeas corpus*, and the Supreme Court of the District of Columbia has refused to grant appellant his discharge from the custody of the defendant as he hath prayed and doth still pray.

That he stands convicted by the Police Court of the District of Columbia upon a charge of conspiracy, and that he believes his conviction was unjust principally for that he was convicted of a crime against the United States without having been granted a jury trial as he had prayed, and was so convicted by a magistrate in whom were reposed judicial powers in contravention of the constitution of the United States, said magistrate having been appointed for a term of years instead of for good behavior.

That the questions involved in his said petition, are of great public importance, for that if petitioner has been deprived of his rights as stated, so are others charged with crime daily denied their constitutional rights in the District of Columbia, and for the same reasons.

J. H. RALSTON,
Of Counsel for Appellant.

127-540

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, APPELLANT,
vs.
A. A. WILSON, MARSHAL.
} No. 1318.

BRIEF FOR THE APPELLEE.

WM. A. MAURY, Assistant Attorney-General.

127-5-40

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, APPELLANT,
vs.
A. A. WILSON, MARSHAL.
} No. 1318.

BRIEF FOR THE APPELLEE.

WM. A. MAURY, Assistant Attorney-General.

In the Supreme Court of the United States

OCTOBER TERM, 1887.

JAMES C. CALLAN, APPELLANT,
vs.
A. A. WILSON, MARSHAL.
No. 1318.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

A criminal information was lodged in the police court of the District of Columbia, by the United States attorney for this District, against the petitioner and certain others exercising the calling of musician, and charging them, in short, with having entered into a conspiracy to "boycott" certain musicians named.

The information was prosecuted to a conviction of the petitioner and his co-conspirators, each of whom was sentenced to pay a fine of $25, "and in default to be committed to the jail for the term of thirty days each" (p. 6).

At the time they entered the plea of not guilty to the

information the defendants made a formal demand for a trial by jury, which was denied (p. 10).

The appeal taken from the judgment of the police court to the supreme court of the District having been withdrawn and the petitioner having failed to pay the fine laid on him, Mr. Justice Montgomery, holding the criminal court, committed him to the custody of the marshal, the appellee, that the sentence of the police court might be carried into effect (p. 12).

Thereupon the petitioner and appellant sued out a writ of habeas corpus from the supreme court of the District, returnable before the justice of the said court, holding the criminal court (p. 12), who, in his turn, certified the writ and "the questions made thereby to the court in general term for hearing in the first instance" (p. 13).

The court in general term refused to discharge the petitioner, and thereupon he appealed to this court (p. 13).

POINTS INVOLVED IN THE APPEAL.

The questions arising on this appeal may be stated in the very language of the petition for the writ, namely:

Your petitioner further shows, that he is now in the custody and keeping of the said marshal, and is unlawfully restrained of his liberty, for that your petitioner has not been indicted of said alleged crime by a grand jury, nor has he been tried, as he respectfully submits was his right, as a person accused of a crime entitled him to be tried, to wit, by a jury of twelve lawful men, residents of the District of Columbia, nor was the proof, as demanded by him, submitted to any jury, and that said penalty imposed by the said court is contrary to the law of the land, for that it was not imposed upon a conviction upon an indictment found by a grand jury of the District of Columbia, and that he was deprived of his constitutional right to a speedy trial, and that he was tried before a court not created in accordance with the United States Constitution, nor had the police court jurisdiction to hear and determine the matters and things set out in the said information, nor was the said penalty imposed upon the verdict of a jury.

ARGUMENT.

The petitioner's complaint that he was not held to answer on a presentment or indictment of a grand jury may be dismissed without further notice, as the conspiracy laid in the information is not an "infamous crime" within the meaning of the fifth amendment of the Constitution, the punishment of the offense not being by confinement in a penitentiary, and the offense itself not being *crimen falsi*. (*Ex parte* Wilson, 114 U. S. R., 417; *Mackin* v. *United States*, 117 U. S. R., 348.)

The only questions that remain are (1) had the petitioner the right to a trial by jury, and, if he had, (2) has that right been infringed?

Perhaps there is still another question, namely, whether the right claimed by the petitioner, if it exists, and has not been denied to him, was accorded to him in a way that was not "speedy" in the sense of the supposed constitutional guaranty?

The legislation complained of as infringing the constitutional rights of the petitioner is contained in the following sections of the Revised Statutes of the District of Columbia:

SEC. 1049. The police court shall have original and exclusive jurisdiction of all offenses against the United States committed in the District not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and ordinances of the District in force therein.

SEC. 1064. Prosecutions in the police court shall be by information under oath, without indictment by grand jury or trial by petit jury.

SEC. 1073. Any party deeming himself agrieved by the judgment of the police court may appeal to the supreme court.

SEC. 1074. In all appeals the party applying for appeal shall enter into recognizance, with sufficient surety to be approved by the judge, for his appearance at the criminal term of the supreme court then in session, or at the next term thereof if the criminal term be not then in session, there to prosecute the appeal and to abide by the judgment of the supreme court.

SEC. 1075. Upon such recognizance being given all further proceedings in the police court shall be stayed.

SEC. 1077. Upon the failure of any party appealing from the judgment of the police court to the supreme court to enter into recognizance, as provided for in section ten hundred and seventy-four, he shall be committed to jail to await his trial upon his appeal, and the trial shall be had in the supreme court as though such recognizance had been entered into.

SEC. 773. Appeals from the police court shall be tried on the information filed in the court below, certified to the supreme court, by a jury in attendance thereat, as though the case had originated therein, and the judgment in the supreme court shall be final in the case.

Let us turn now from the legislation of Congress to the Constitution.

As originally framed and adopted by the States, the Constitution contained the following provision relevant to the present discussion:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed. (Art. 3, sec. 2.)

This provision being found to be defective, upon the severe scrutiny and discussion the Constitution had received when before the people, the sixth amendment was adopted, namely:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

IS THERE ANY CONSTITUTIONAL GUARANTY AS TO TRIAL BY JURY IN THIS DISTRICT?

It would seem that the Constitution does not require that the right of trial by jury shall be secured to the people of this District.

The original provision of the Constitution prescribing trial by jury for all crimes (*supra*) does not appear to contain such a requirement, when attentively considered in the light of contemporaneous construction.

Mr. Madison, to whom the matter of amending the Constitution gave great anxiety, brought the subject to the attention of the First Congress in a speech in the House of Representatives, containing his reasons for urging the subject upon the attention of the House and his suggestions as to the amendments which it was, in his judgment, expedient to make. (Debates in Congress, old series, vol. 1, pp. 448–459.)

These suggestions, together with the amendments proposed by the several States, were referred to a committee of one member from each of the eleven States then composing the Union, by an order which is referred to in the debates (vol. 1, p. 690), in the following language:

> It was then ordered that Mr. Madison's motion, stating certain specific amendments proper to be proposed by Congress to the legislatures of the States, to become, if ratified by three-fourths thereof, part of the Constitution of the United States, together with the amendments to the said Constitution as proposed by the several States, be referred to a committee, to consist of a member from each State, with instruction to take the subject of amendments to the Constitution of the United States generally into their consideration and to report thereupon to the House.

The report of that committee and the action on it seem to show very clearly that it was the intention of the

committee and of Congress to overlay and supplant, by amendment, the provision with reference to trial by jury in the second section of the third article of the Constitution.

The articles of the committee's report covering, *inter alia*, the third paragraph of the second section of the third article of the Constitution are the thirteenth and fourteenth, and are as follows:

> THIRTEENTH. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.
>
> FOURTEENTH. The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury *of the vicinage*, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; *but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place* WITHIN THE SAME STATE. (Journal, H. R., 1st sess., 1st Cong., p. 108.)

Now it was evidently upon the idea that what was contained in these two articles was more than the full equivalent of the third paragraph of the second section of the third article of the Constitution, that the committee recommended that that paragraph should be stricken out and Article 13 of the report inserted in its room (Debates, vol. 1, p. 784).

It is manifest that the sole purpose of the committee was to provide for the trial by jury of crimes committed *within the States*, and nowhere else, and this intention is carried out by the provision of the sixth amendment,

securing the right to trial by jury "*in the State and district wherein the crime shall have been committed.*" ,

But to complete the history of this sixth amendment, it is necessary to lay before the court the amendment recommended by Mr. Madison for insertion in the Constitution in place of the third clause or paragraph of the second section of the third article, which was to be stricken out. It is as follows:

> Seventhly, That in article 3, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:
>
> The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger), shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offense.
>
> In cases of crimes committed *not within any county*, the trial may by law be *in such county* as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate. (See reference to Mr. Madison's Speech, *supra*.)

It would seem from the context that the reference to "crimes committed *not within any county*" is, as in the previous paragraph, to crimes committed within the jurisdiction of a State, although without the limits of a county, as, for example, crimes committed on the high seas within the limit up to which the State law is allowed to have effect. The subsequent words that in such cases "the trial may by law be *in such county* as the laws shall have prescribed" would seem to call for that meaning.

Indeed, it may be said that the original provision in

the Constitution, that when a crime was not committed within any State, "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offenses committed on the high seas. It is hardly probable that it referred to the great territorial domain of the United States, for that was amply provided for in respect of the guaranties of Anglo-American liberty by the celebrated ordinance of 1787, and by the several acts of Congress extending its provisions to other parts of the national domain as the demands for local government from time to time arose. (1 Stat. 323; *ib.* 549; 2 *ib.* 58; *ib.* 309; *ib.* 514.)

It would seem, then, clear that in adopting the sixth amendment the people of the several States were, as we have said, solicitous about trial by jury in the *States and nowhere else*, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District, and places to be thereafter ceded for the purposes respectively of a seat of government and forts, magazines, arsenals, and dock-yards.

This was a discretion that was wisely left to Congress, and which it was not at all likely the people of the several States would allow their Representatives in Congress to abuse so long as they themselves should remain worthy of the free institutions they had founded. The people of the several States, it may be added, exhibited the same indisposition to restrict the Federal Government when they disabled themselves by the Constitution from passing laws impairing the obligation of contracts, and from making anything but gold and silver coin a tender in

payment of debts, and left that Government wholly unfettered in these respects.

The argument for the extension of the guaranty of trial by jury to this District does not derive support from any fancied invidiousness in withholding it, because we find in the Constitution another such instance equally disparaging to the people of the Territories, and more difficult to account for, in the denial to them of the right to go into the Federal courts upon the ground of a controversy with a citizen of any one of the States (*Hepburn* v. *Ellzey*, 2 *Cr.*, 226; *Barney* v. *Baltimore*, 6 *Wall.*, 287; *R. R. Co.* v. *Harris*, 12 *Wall.*, 86); the reason of this head of Federal jurisdiction, namely, the apprehension that the law would not be always administered without a tincture of prejudice by the courts of a State where a citizen of another State was a party, being as cogent for the Territories as the States.

But, in addition to what has been said above, it may be advanced with some confidence that upon a well-established canon of interpretation—generally applied to statutes, it is true, but not confined to them, by any means—the sixth amendment must be regarded as an entire displacement and repeal of the third paragraph of the second section of the third article of the Constitution.

The general rule that affirmative words in a subsequent do not operate a repeal of a prior statute is to be taken with the qualification that, if such words manifest an intention that the later statute shall take the place of the former, a complete repeal of the latter is the result. As this court say, in *United States* v. *Tynen* (11 Wall., 92):

* * * And even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first,

and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. (See also *Pana* v. *Bowler*, 107 U. S., 538; *King* v. *Cornell*, 106 U. S., 396; Wilberforce on Statutes, pp. 328, 329, 330.)

But when the sixth amendment is taken in connection with its authentic documentary history, it becomes, if possible, still more clear that it was intended to supersede the third paragraph of the second section of the third article of the Constitution.

It is true that in *United States* v. *Jackalow* (1 Black, 484) the third clause of the second section of the third article of the Constitution is referred to as the source of Congressional power to fix the place of trial for offenses not committed within any State. But no question was raised in that case as to whether this provision had been ~~suspended~~ superseded by the sixth amendment, or as to whether the powers "to define and punish piracies and felonies committed on the high seas" and to govern the Territories in the United States, did not give by implication all the power needed for that purpose. The truth is, in all probability, that the provision as to the trial of offenses not committed within any State, and the exception as to cases of impeachment, were both left out of the sixth amendment as entirely unnecessary. In Mr. Madison's draught of what afterwards became in part the sixth amendment, there was inserted not only the exception of cases of impeachment, but also of cases arising "in the land and naval forces or the militia when on actual service in time of war or public danger," which latter was quite as unnecessary as the former, and therefore was dropped.

SUPPOSING A CONSTITUTIONAL GUARANTY OF TRIAL BY JURY TO EXIST, IT HAS NOT BEEN DENIED.

In discussing this point it is important to give close attention to the phraseology of the sixth amendment and the provision it supplanted; for we must presume that in such an instrument as the Constitution every word was used with the greatest deliberation and caution, or, to borrow the impressive words of Mr. Chief-Justice Taney, in *Holmes* v. *Jennison* (14 Pet., 571)—

> In expounding the Constitution of the United States every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many discussions which have taken place upon the construction of the Constitution have proved the correctness of this proposition, and shown the high talent, the caution, and the foresight of the men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning. * * *

The language of the amendment to which we desire to call attention is, that in all criminal prosecutions the accused "*shall enjoy the right*" to a trial by jury.

The original language of the Constitution was that "the trial of all crimes, except in cases of impeachment, SHALL be by jury."

There is a difference in the meanings of these two forms of expression.

According to the language of the third article, trial by jury in all criminal cases *was made indispensable* and to be waived in no circumstances; but, according to the language of the amendment, while the *right* to this mode of trial is secured, it was evidently contemplated that, at least in some cases, such right might be waived and some other kind of trial substituted.

Speaking of the provision in the seventh amendment, that "in suits at common law, where the value in controversy shall exceed $20, *the right of the trial by jury shall be preserved*," the court says in *Bank of Columbia* v. *Okely* (4 ~~N.~~ H., 244), "but the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished." (See also *Edwards* v. *The State*, 45 N. J., Law, 419.)

This marked change of phraseology could not have been adopted without an intention to convey in the amendment a sense different from that of the third article. We know from the debates in the House (the Senate sat at that time with closed doors) that the disposition among the friends of the Constitution was to make no changes in in it that could possibly be avoided, which is an additional argument strongly in favor of our position.

We submit, then, that it is clear that the requirement of the sixth amendment that the accused shall *enjoy the right* of trial by jury is a *lex pro se introducta* which is largely subject to the will of the accused, and not a mode of trial forced upon him as it was by the provision of the Constitution which was supplanted by the amendment.

This being established, we have made a great stride towards the solution of the question in hand.

The legislation complained of is not a novelty, but has its exemplar in many of the States.

The offenses to which the jurisdiction of the police court extends are "simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and

ordinances of the District in force therein." (§ 1049, R. S. D. C.)

Any person who feels aggrieved by the judgment of the police court may appeal to the supreme court of the District (§ 1073), where his appeal shall be tried by a jury "*as though the case had originated therein*, and the judgment of the supreme court shall be final in the case." (§ 773.)

Mr. Dillon in his work on Municipal Corporations (Vol. I, § 367) thus states the law with reference to this kind of legislation after a survey of the authorities. He says:

> It is, however, the prevailing doctrine that although the charge or matter in the municipal or local courts be one in respect of which the party is entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.

This language is cited with approbation by Judge Brewer, now circuit judge of the 8th circuit, in delivering the opinion of the supreme court of Kansas in *City of Emporia* v. *Volmer* (12 Kans., 622). He said:

> A fifth error alleged is, that a jury trial was refused the defendant in the police court. In the district court a motion was made and overruled to dismiss the case because defendant had been refused a jury trial in the police court. Was he entitled to a jury trial? The statute plainly authorizes such summary proceeding in the police court. (Laws, 1872, p. 217, § 83.) And the only question that can be raised is, whether such section conflicts with the provision in § 5 of the bill of rights, which declares that "the right of trial by jury shall be inviolate." Without attempting to decide as to the extent or limits of this constitutional provision, it is enough for us in this case to decide that, where the summary proceeding authorized by statute is in a municipal court, for the violation of one of the city ordinances, and the defendant may have an appeal, clogged by no unreasonable restrictions, to an appellate court in which he has a right to a trial by jury, this is sufficient, and his constitutional rights are not invaded. (Dillon on Munic. Corp., § 367, and cases cited in note; *Byers* v. *Common-*

wealth, 42 Penn. St., 89; *McGear* v. *Woodruff*, 33 N. J. Law, 213; *The State* v. *Young*, 3 Kas., 445.)

In *Jones* v. *Robbins* (8 Gray, 329) one of the questions was as to the constitutionality of a statute that authorized a magistrate to try and pass sentence in a criminal case; but which, at the same time, left the accused an unfettered right of appeal and a trial by jury in the appellate court, with the requirement of bail or commitment. In disposing of it, Chief-Justice Shaw said:

> And we believe it has been generally understood and practiced here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive at his own election, and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed, it is not violated by an act of legislation which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal and trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial to the sitting of such court; they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other States. It appears to us, therefore, that such a provision is not void as a violation of that clause, which, in criminal cases secures to the accused a right of trial by jury.

This case arose on habeas corpus, was considered with the greatest deliberation, and must be regarded as a commanding authority.

The same doctrine was reiterated in *Commonwealth* v. *Whitney* (108 Mass., 5).

The case of *Bank of Columbia* v. *Okley* (*supra*) is a powerful authority in support of the doctrine contended for by us. It is true, that case arose on the seventh amendment, but it will appear on consideration that the reasoning as to cases arising on both amendments is very similar,

if not identical, where the legislation complained of as invalid is substantially the same.

The authorities on this subject are collected in Cooley's Constitutional Limitations, page [410], note 5, and page 507 of the fifth edition. See, in addition, *Dillingham* v. *State* (5 Ohio State, 280), and Sedgwick on Stat. and Com. Law, 491, etc., and notes.

The only case opposed to the view contended for by us is *ex parte* Dana (7 Ben., 1), where it was held that the very legislation now in question was unconstitutional on the ground that the guaranty of jury trial can not be satisfied, at least in criminal cases, by the mere privilege to have a trial by jury on condition of first submitting to a trial without it, and then, in case of conviction, taking an appeal. After this statement of the result of the case Judge Cooley adds: "The guaranty clearly intends a trial by jury in the first instance." (Con. Lim., p. 410, note, 3d ed.)

It would seem that none of the cases taking the opposite view, particularly the elaborate judgment of Chief-Justice Shaw in *Jones* v. *Robbins* (*supra*), was brought to the attention of the eminent judge who decided Dana's case, because, if those authorities had been cited, it would have been unlike that judge to make no reference to them whatever. It may be added that not a single authority is referred to in the opinion of the court.

It is remarkable that Judge Cooley, with the authorities before him, gives the subject no discussion, contenting himself by merely stating the result of the cases.

As this is one of the instances where a constitutional guaranty requires legislation to give it effect, the court

should not interfere with the discretion of the legislature so long as there is no attempt to hamper seriously or frustrate the intention of the Constitution. This is well illustrated by the decisions of this court touching the power of the State legislatures over remedies, which lay down that so long as a remedy is not denied or seriously impaired by conditions and restrictions the legislation prescribing it is not subject to judicial control. (*Tennessee* v. *Sneed*, 96 U. S. R., 74; *Antoni* v. *Greenhow*, 107 U. S. R., 775, and cases cited.) As to what is a reasonable regulation is primarily with the legislature, and its decision upon the subject cannot be overruled by the courts "*unless a palpable error has been committed.*" (*Terry* v. *Anderson*, 95 U. S. R., 633.)

As the legislature must have the power to determine what remedies shall be used in the administration of justice, so must it have the power to determine under what regulations the right of trial by jury shall be enjoyed, and it would be an invasion of the domain of legislation for the courts to say what regulations in these cases are reasonable and what are not, so long as they do not impair the constitutional right.

It is proper to call the attention of the court to the view, supported by authority, that the guaranty of trial by jury has never been understood to embrace petty offenses. (*Byers & Davis* v. *Comm.*, 42 Pa. St., 89, per Strong, J.; *McGear* v. *Woodruff*, 33 N. J., 213.)

We respectfully submit that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

127-540

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In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES C. CALLAN, APPELLANT,
vs.
A. A. WILSON.
No. 1318.

Additional Brief of Appellee.

In answer to the point that the judge of the police court of the District of Columbia is one of the depositories of the judicial power granted and defined in the third article of the Constitution, and therefore that the tenure of his office not being "during good behavior," he was not a judge in so far as the trial of the offense of which the appellant was convicted is concerned.

There are several answers to this position.

FIRST.

The courts of this district are not of the "inferior courts," which the third article says

Congress "*may* from time to time ordain and establish."

The inferior courts referred to in the third article are courts which Congress was under no obligation to establish, but *might establish or not, as it saw fit.*

The debates on the Constitution show that there was great opposition in the convention to having ~~more~~ other than one supreme court with a stinted original jurisdiction and an appellate jurisdiction commensurate with the Constitution, laws, and treaties of the United States. (5 Ell. Deb., pp. 156, 159, 191, 331, 380.)

It was as a compromise between these opposing views made optional with Congress to establish the inferior courts or not, some hoping that the power would lie dormant and that the State courts would be allowed to act as courts of original jurisdiction in all cases falling within the judicial power.

It follows, then, that the courts of the District can not be of the inferior courts contemplated by the third article of the Constitution, for Congress has no such option as to them, since the

failure to create them *would produce a failure of government in the District.*

SECOND.

Before the courts of this District can be shown to be of the inferior courts contemplated by the third article, it must appear that they can be the depositories of the judicial power exactly as it is defined in the Constitution and intended to vest in those inferior courts. But this they can not be without holding that the common law and equity jurisprudence and the statutes of Maryland became by the cession of the District "laws of the United States" in the sense of that term as used in the grant of the judicial power.

The result of such a view would be to make every case arising under the laws of this District cognizable by the circuit courts of the United States as a case arising under a law of the United States, which seems *a reductio ad absurdum.*

This view is greatly enforced by the consideration that the Constitution contemplated that the District which was to become the seat of the